Supreme Court, U.S.
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No. 10-616

IN THE

Supreme Court of the United States

THOMAS JOHN SALZANO,

Petitioner,

v.

NORTH JERSEY MEDIA GROUP, INC.,
dba THE RECORD, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

JENNIFER A. BORG
DINA L. SFORZA
NORTH JERSEY
MEDIA GROUP INC.
Legal Department
1 Garret Mountain Plaza
P.O. Box 471
Woodland Park, NJ 07424
(973) 569-7680

BRUCE S. ROSEN
Counsel of Record
KATHLEEN A. HIRCE
McCUSKER, ANSELMI,
ROSEN & CARVELLI, PC
210 Park Avenue
Suite 301
Florham Park, NJ 07932
(973) 635-6300
brosen@marc-law.com

Attorneys for Respondents

233795

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether the Petitioner presented compelling reasons to grant the Petition, where the Petition does not implicate an important federal question that has not been settled by this Court and where the Petition is interlocutory?

II. Whether the Petitioner presented compelling reasons to grant the Petition, where the holdings of the Supreme Court of New Jersey are based on state common law and do not conflict with a decision of this Court or a Court of Appeals?

III. Whether the Petitioner presented compelling reasons to grant the Petition, where Petitioner is asking this Court to review the factual and legal determinations of the Supreme Court of New Jersey, where that Court ruled that (1) the State common law fair report privilege applies as a conditional privilege only until a court determines that the report was fair, accurate and complete, when the privilege then becomes absolute; (2) the initial pleadings exception for the fair report privilege contained in the Restatement (Second) of Torts § 611 (e) would thwart the public policy underpinning of the fair report privilege, the free flow of information based upon state defamation law; and, (3) allegations against Petitioner contained in a Complaint filed on behalf of the U.S. Trustee in Bankruptcy Court "fitted comfortably within the definition" of the word "steal," which was used in a news report to describe the contents of that Complaint.

CORPORATE DISCLOSURE

Respondent North Jersey Media Group Inc. d/b/a *The Record* and northjersey.com is a wholly-owned subsidiary of Macromedia Incorporated, a privately held company, and there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

Pro se Petitioner has presented no "compelling reasons" for granting of his Petition for a Writ of *Certiorari*. In fact, the Petition does not meet **any** of this Court's criteria for grant of the Writ: the Petition does not implicate an important federal question left unsettled by this Court, it does not address a conflict between the Courts of Appeals, and finally, it is interlocutory, coming after resolution of a motion to dismiss the case in the Supreme Court of New Jersey, which remanded the remaining portion of this matter back to the trial court for further proceedings.

This matter involves pure application of state defamation law by a state's highest tribunal in dismissing most of Respondent's claims under the fair report privilege. The Supreme Court of New Jersey made three rulings in this matter. First, it unanimously recognized a national trend among state courts interpreting their common and statutory law by holding that the fair report privilege applies to news reports of initial complaints, even if those initial filings have not been the subject of "judicial action," thus rejecting an exception that is contained in the Restatement (Second) of Torts § 611 (e). Second, the high court, also interpreting New Jersey common law, unanimously adopted the modern view that fair report is a "hybrid" of a "conditional" and "absolute" privilege; that is, a news report is conditionally privileged until a court has ruled that it is full, fair, and accurate, at which time it becomes absolutely privileged and cannot be overcome by a showing of actual malice.

Finally, the New Jersey court split 3-3 on whether the privilege applied to this case; that is, whether the "gist" or "sting" of the news reports at issue was any worse than the serious allegations made against Respondent in the Complaint filed by the U.S. Trustee in the involuntary bankruptcy of NorVergence, a Newark, N.J. telecommunications company controlled by Petitioner's family. However, because the New Jersey intermediate court, the Appellate Division of the Superior Court, had ruled affirmatively that the "gist" or "sting" of the news reports was no worse than the language in the Complaint, that portion of the Appellate Division decision was upheld and most of the claims were dismissed.

There can be no dispute that the fair report privilege is a common law privilege, and not a constitutional defense. As the Supreme Court of New Jersey noted below:

> The fair-report privilege is considered to be "one of the most powerful and frequently invoked common-law defenses." Rodney A. Smolla, LAW OF DEFAMATION § 8.67 (Thomson Reuters/West, 2d ed. 2008) and is widely recognized in judicial decisions and by statute. [n.2] The fair report privilege has been recognized by common law or statute in at least forty seven states and the District of Columbia.

Petitioner's Appendix ("Pet. App.") at 18a (balance of footnote omitted from quotation).

In his argument seeking this Court's review, Petitioner confuses the jurisdictional requirement of a conflict among the Federal Circuits with a conflict among the states (or a conflict among Federal Circuits interpreting state law). While many states have slight variations in their fair report privilege, none of these variations involves a federal question, and a conflict among the states regarding state common law issues is not a compelling reason to accept this Petition. These variations clearly fall within this Court's holding in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974), that States are free to make their own standards regarding libel law so long as they do not impose strict liability.

Equally unavailing is Petitioner's argument confusing the *First Amendment* "conditional privilege" imposed by the actual malice standard, which "immuniz[es] non-malicious misstatements of fact regarding the official conduct of a government officer" as set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (and expanded, by its progeny, to public figures and certain matters of public concern), with the "conditional privilege" of a fair report, whereby in many states actual malice can overcome a fair report. In his bewilderment, Petitioner equates New Jersey's decision to end years of conflicting rulings regarding whether the State's fair report privilege was a conditional privilege, with somehow violating this Court's precedents and undercutting reputational protections for *plaintiffs*, which he purports are provided by the actual malice standard. This position constitutes nothing more than a fundamental misunderstanding of both the actual malice doctrine and common law privileges as they are examined in cases Petitioner cites; it does not

present a valid reason for this Court to grant the Petition.

Finally, Petitioner desperately attempts to conjure a federal question by asking this Court to review the lower court's determination that the Trustee's allegations against Petitioner—of fraudulent transfer, common law conversion, misappropriation and unjust enrichment—carried the same "gist" or "sting" as references in headlines and in the body of the news reports at issue. Because a State court's defamation law analysis touched upon *terms used in bankruptcy law*, however, does not mean that a federal question exists. Further, Petitioner's argument, carried to its logical extension, would require that journalists essentially be lawyers, and would permit the fair report privilege only where journalists specifically and exactly define allegations of bankruptcy fraud according to definitions propounded by a federal court. This onerous and unprecedented burden for the media would eliminate the current standard of "substantial accuracy" in determining whether a report is full, fair and accurate. In any event, examination of this issue involves focusing on interpretation of state common law outside of any federal constitutional framework, a practice in which this Court does not engage.

In sum, Petitioner has failed completely to carry his burden of demonstrating that there are compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

On March 1, 2006, the U.S. Trustee for New Jersey, through counsel, publicly filed a Complaint that Petitioner "unlawfully diverted, converted and misappropriated" approximately $470,000 from NorVergence, a bankrupt Newark, N.J. company controlled by his family, "for his own personal benefit," which included the purchase of a residence and charging personal expenses to a corporate charge card, with no intention of reimbursing NorVergence. Pet. App. at 5a-6a, 76a-77a.

The news reports at issue were published on the business pages of *The Record*, which covers northern New Jersey news, and were reprinted on northjersey.com and in the *Glen Ridge Voice*, each published by Respondent North Jersey Media Group Inc. ("NJMG"). Pet. App. at 6a-9a. The reports followed the U.S. Federal Trade Commission's $181.7 million default judgment against NorVergence and the abrupt involuntary bankruptcy of the company, which coincided with the loss of approximately 1,300 jobs and the dislocation of thousands of small businesses dependent on its telecommunications services. *Id.* at 4a, 8a. Together, all of these events made publication of information involving NorVergence's bankruptcy indisputably a matter of public concern.

Petitioner's Complaint for defamation, invasion of privacy, and infliction of emotional distress alleges that the news reports implied that he was criminally charged with theft; specifically, Petitioner alleges that references in headlines and in the body of these news reports, such

as "Man accused of stealing $500,000 for high living," and "Argyle residence allegedly bought with stolen funds" were defamatory *per se* because use of the words "stealing" and "stolen funds" impute criminal conduct and stray from the narrow legal definitions of "fraudulent transfer." *Id.* at 9a-10a. In fact, the allegations in the news reports were broader than simply "fraudulent transfer," and were clearly attributed to information contained in the Trustee's Complaint, which was filed in the *civil* U.S. Bankruptcy Court, and which allegations accused Petitioner of taking funds with the intent not to repay them. *Id.* at 5a-6a, 76a-77a. Moreover, the news reports carried no mention of an arrest, a criminal charge or potential charge, any potential penalties, or the name of a governmental authority that would bring such a charge, such as the U.S. Attorney's Office.

Among other defenses, Respondents asserted the fair report privilege. Pet. App. at 11a. The trial court summarily dismissed the Complaint, ostensibly as a fair report, ruling that the news reports accurately described the Trustee's Complaint and, thus, there was no falsity and no actionable defamation. *Id.* at 100a. The Appellate Division reversed, ruling that while the news reports were full, fair, and accurate, they were not eligible for fair report protection because they were based on an initial complaint against Petitioner that had not yet been subjected to "judicial action." *Id.* at 78a-81a. The news reports were, therefore, excepted from the fair report privilege pursuant to Restatement (Second) of Torts § 611 (e). Pet. App. at 78a-81a. The appellate panel also ruled that under New Jersey law, the news reports were a matter of public concern requiring Petitioner to prove actual malice. *Id.* at 83a.

Both parties sought review in the Supreme Court of New Jersey, which granted certification. That Court first stayed, then unanimously reversed, the appellate panel's holding that the initial filing exception to fair report exists in New Jersey, instead adopting the modern view that no such exception exists. *Id.* at 13a, 30a-31a. The Court then further clarified years of conflicting decisions regarding whether fair report was a conditional or absolute privilege and unanimously held, in accord with Restatement (Second) of Torts § 611 (a), that the fair report privilege:

> is neither fish nor fowl—that is, it is neither purely absolute nor purely conditional. Rather, it is a hybrid; it is conditional insofar as it cannot attach unless the report is full, fair, and accurate. Once that condition is met, the privilege becomes absolute and cannot be defeated. The publisher's failure to do what is necessary to make the report full, fair, and accurate is the only relevant inquiry.

Pet. App. at 40a-41a. Finally, the Court split 3-3 on whether the "gist" or "sting" of the news reports was any worse than the significant allegations against Respondent contained in the Trustee's Complaint. *Id.* at 33a-35a, 48a. Because of the Court's deadlock on this issue, the Appellate Division's previous ruling that the "gist" or "sting" of the news reports was no worse than the Complaint against Petitioner was upheld. *Id.* at 46a.

Thus, the Supreme Court of New Jersey dismissed all claims regarding news reports of the U.S. Trustee's filing, remanding the one remaining claim—libel and

associated torts related to the news reports' description of Charity Snack, a separate business venture between Petitioner and his father—back to the trial court. *Id.* at 46a. The Supreme Court of New Jersey denied a subsequent motion by Petitioner asking it to reconsider its finding that the news report was protected by the fair report privilege. *Id.* at 102a.

REASONS FOR DENYING THE PETITION

THE PETITION SHOULD BE DENIED BECAUSE THIS COURT LACKS JURISDICTION TO DECIDE THE ISSUES PRESENTED BY PETITIONER SALZANO.

The decisions of the New Jersey courts below do not conflict with a decision of this Court or any Court of Appeals, nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried his burden of demonstrating any "compelling reason" for his Petition to be granted. *See Sup. Ct. R.* 10.

I. The Instant Matter Does Not Involve a Question of Federal Law.

Petitioner Salzano improperly cites 28 *U.S.C.* § 1254 ("Courts of appeals; certiorari; certified questions") as the basis for this Court's jurisdiction over his Petition. That statute describes the methods by which this Court may review federal appellate cases. Since this matter involves a decision of state law by the Supreme Court of New Jersey, the question of jurisdiction is properly viewed through the requirements of 28 *U.S.C.* § 1257

("State courts; certiorari"). As this Court has continually recognized, its jurisdiction over decisions of state courts has been limited by Congress to include only those cases involving a question of federal law *and* a final judgment by a state's highest court. *See, e.g., Jefferson v. City of Tarrant*, 522 U.S. 75, 80-81 (1997) (noting both that "Congress has vested in this Court authority to review federal question decisions made by state courts[]" and that "Congress has limited that power to cases in which the State's judgment is final."). Finality—which is not present in this case—will be discussed further below. The more immediate flaw in the instant Petition is the lack of a federal question. Pursuant to 28 *U.S.C.* § 1257, this Court may review only final judgments of a state's highest court:

> where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The instant Petition evokes none of these criteria. As noted, this case involves the application of New Jersey's common law fair report privilege. Thus, on the most basic level, this case does not involve a state statute "repugnant to the Constitution, treaties, or laws of the United States" and does not meet the jurisdictional mandate of 28 *U.S.C.* § 1257.

Petitioner's attempts to paint this matter as involving a federal question are unpersuasive. To the extent Petitioner attempts to fashion the fair report issue as an "overwhelming" area of national divide, he is misguided. All of the decisions cited by Petitioner claiming a purported "conflict" requiring resolution of this Court are state or federal cases deciding state common law defamation; this Court has never determined the fair report privilege to be a federal issue. Petition ("Pet.") at 17-19. As Judge Sack succinctly noted in his defamation treatise: "The constitutional status of the fair report privilege is uncertain; the Supreme Court has not treated the matter directly." Robert D. Sack, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 7:3.5[B][8] (4th ed. 2010) (footnote omitted). Thus, without any constitutional or federal statutory issue, this matter does not properly fall within this Court's jurisdiction.

Nor does Petitioner's invocation of this Court's jurisprudence regarding application of the actual malice doctrine as a "conditional" check on defamatory publication transform his arguments into a federal question. As explained above, Petitioner confuses the "conditional privilege" imposed by the actual malice standard, as set forth in *New York Times*, *supra*, 376 U.S. 254, with the "conditional privilege" of a fair report, which in some states means that actual malice can overcome a fair report. Pet. at 26, 30. Here, the Supreme Court of New Jersey ended years of conflicting rulings within the State regarding whether actual malice could defeat the State's fair report privilege. Pet. App. at 38a, 40a-41a. The court ruled that once the report is determined by a court to be full, fair, and accurate, "the

privilege becomes absolute and cannot be defeated." Pet. App. at 40a-41a. Petitioner essentially argues that by creating an "absolute" state common law privilege, as exists in many states, the Supreme Court of New Jersey violated this Court's precedents and undercut reputational protections for *plaintiffs*, which he purports are provided by the actual malice standard.[1] Pet. at 30.

Thus, in a fanciful attempt to turn state common law defamation on its head, Petitioner urges this Court to "strike a proper balance of preserving individual reputation with freedom of speech and the press" (Pet. at 20) by federalizing *and limiting* the common law fair report privilege. Not only does this assertion belie the rationale behind the actual malice standard, which is designed to provide *more* breathing room for speech on matters of public concern through a higher standard of proof for libel plaintiffs, but it also completely undermines the rationale for the fair report privilege, without which it would be practically impossible for the media to cover public events, particularly court activities, which are naturally imbued with defamatory allegations.

1. Petitioner – who argues strenuously against the actual malice standard applying to him – nevertheless creates out of whole cloth the baseless notion that this Court's actual malice standard extends to the state common law privilege *in reverse*, by reducing protections for the media in a sort of "good for the goose, good for the gander," parity. Pet. at 25-26, 30. This nonsensical interpretation of the law ignores this Court's holding in *Gertz*, *supra*, 418 U.S. at 345-46, permitting states to "retain *substantial latitude* in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." (emphasis added).

Petitioner illustrates his folly by pointing to a series of cases decided by this Court, such as *Herbert v. Lando*, 441 U.S. 152 (1979), which declined to provide a *First Amendment* absolute privilege for media libel defendants against inquiry into editorial processes. Pet. at 28-30. Petitioner suggests that language in the *Herbert* opinion rejecting an "absolute First Amendment privilege" against inquiry into editorial processes somehow translates to a flat prohibition against any "absolute" privilege in defamation cases, even common law privileges such as fair report (and by extension, the litigation privilege). Pet. at 29-30. This theory is a confused misreading of defamation law, particularly *Herbert*, where the media defendant sought to expand the *First Amendment* to shield against compelled testimony of editorial processes so as not to chill freedom of the press. While the *Herbert* Court held against such an expansion of the *First Amendment* in that context, this Court has never opined that such protections cannot exist within the confines of state statutes or common law. Indeed, that same protection unsuccessfully sought by the media in *Herbert* has existed under New Jersey common law for media defendants since shortly after *Herbert* was decided, under the Supreme Court of New Jersey's interpretation of the New Jersey Newsperson's Privilege *N.J.S.A.* 2A:84A-21 *et seq.* *Maressa v. New Jersey Monthly*, 89 N.J. 176, 189 (1982).

That this Court has encouraged States in *Gertz* to fashion their own defamation law with certain minimal safeguards, and has never rendered a decision regarding the fair report privilege, underscores that this Court has reserved the fair report privilege as an issue

for the States. *Gertz*, *supra*, 418 U.S. at 347. Petitioner acknowledges this in a roundabout way when he concedes that the United States Supreme Court cases he cites do no more than "demonstrate compelling evidence that imply the fair report privilege should only command protection as a conditional privilege and will always be defeated by a showing of actual malice." Pet. at 30. In fact, as explained above, these cases do nothing of the sort.

Petitioner further unsuccessfully attempts to twist his argument into a federal question by insinuating that the New Jersey courts *created* an issue of federal law by mistakenly interpreting how the term "fraudulent transfer" is defined by federal courts and statutes. The New Jersey courts below ruled that a fair report existed because allegations made against Petitioner by the Trustee involving fraudulent transfer, common law conversion, misappropriation, and unjust enrichment, carry the same "gist" or "sting" as references in headlines and in the body of the news reports at issue, such as "Man accused of stealing $500,000 for high living," and "Argyle residence allegedly bought with stolen funds." While this determination—including how much reliance should be placed on court interpretations of the statute—is clearly a matter of state common law, Petitioner claims that based on federal decisions that narrowly define the bankruptcy law violation of "fraudulent transfer," 11 *U.S.C.* § 548, the courts below should have required Respondents to characterize the Trustee's allegations against Petitioner only according to the exact definitions propounded by a federal court. Pet. at 36.

Petitioner's theory of the law would eviscerate any notion of substantial accuracy, which is a hallmark not only of the fair report privilege but also of determining whether a statement is capable of a defamatory meaning. Neither this, nor any other court, has ever placed such an onerous burden on the news media. *See, e.g.*, *Costello v. Ocean County Observer*, 136 N.J. 594, 619 (1994) (noting "we realize that journalists are not lawyers by trade. Errors in reports on court proceedings are bound to occur from time to time, and the *First Amendment* protects those errors as long as they are not recklessly or intentionally made."); *Ricci v. Venture Magazine, Inc.*, 574 F. Supp. 1563, 1568 (D. Mass. 1983) ("courts hearing defamation claims are to apply a common sense standard of expected lay interpretation of media reports of trials, rather than inquiring whether a report was strictly correct in defining legal charges and describing legal rulings.").

Additionally, Petitioner's acknowledgment that "[a]lthough the [Supreme Court of New Jersey] majority correctly observed the [fair report] privilege[']s legal requirements [ ] it failed to faithfully apply said principles to the matter at hand[,]" Pet. at 30, is yet another sure sign that this Petition seeks review of an issue this Court rarely entertains. *See Sup. Ct. R.* 10 ("A petition for a writ of Certiorari is rarely granted when the asserted error consists of erroneous *factual* findings or the misapplication of a properly stated rule of law."). Even if the Supreme Court of New Jersey decision was erroneous, which it was not, it is not the type of error reviewed by this Court.

II. The Instant Matter Involves An Interlocutory Decision.

This Court has recognized that its jurisdiction over decisions of the state courts is limited by the "firm final judgment rule[]" of 28 *U.S.C.* § 1257. *Jefferson*, *supra*, 522 U.S. at 81. Before a state court judgment may be reviewed, it "must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Id.* (quoting *Market St. R.R. Co. v. R.R. Comm'n of Cal.*, 324 U.S. 548, 551 (1945)). In short, the judgment "must be the final word of a final court." *Jefferson*, *supra*, 522 U.S. at 81 (quoting *Market St. R.R. Co.*, *supra*, 324 U.S. at 551). The instant matter is far from "the final word of a final court."

Indeed, the Supreme Court of New Jersey essentially affirmed the appellate court's ruling that, with respect to the remaining claim regarding Charity Snack, the case must be remanded to the trial court due to the "paucity of the record" below, and directed that the Law Division should "apply the standard set out in *Senna* [*v. Florimont*, 196 N.J. 469 (2008)] and may address any other issues raised by either party specific to the Charity Snack claim." Pet. App. at 45a-46a. Further proceedings, including an answer, discovery, motion practice and potentially a trial, will occur in this case (and a case management conference was held with the trial judge on December 3, 2010 to discuss scheduling of these proceedings); as such, the judgment of the Supreme Court of New Jersey was not

final, and this Court should respectfully deny the Petition. *Jefferson*, *supra*, 522 U.S. at 81 (holding that case was outside the Court's jurisdiction and noting particularly that "[a]bsent settlement or further dispositive motions, the proceedings on remand will include a trial on the merits of the state-law claims.").

Finally, while this Court has recognized four exceptions to the final judgment rule, which exceptions allow review notwithstanding a remand and future proceedings in state court, the instant matter does not fall within one of those very narrow categories – each requiring the involvement of a federal issue, which, as explained above, does not exist here. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 479-83 (1975); *see also Johnson v. California*, 541 U.S. 428, 430-32 (2004) (citing *Cox Broadcasting* for descriptions of the narrow categories and ultimately determining that the Court lacked jurisdiction). Thus, this Petition simply cannot – and does not - involve a situation (1) where there will be further proceedings, even a trial, but "for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained"; (2) where the federal issue "finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings"; (3) where if Salzano "ultimately prevails on the merits, the federal issue will be mooted" but if he were to lose, "the governing state law would not permit him again to present his federal claims for review." *Cox Broad. Corp.*, *supra*, 420 U.S. 479-81. Nor, finally is this a situation where, (4):

> [T]he federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Id. at 482-83.

In short, the case being appealed from is a state court decision on a matter of state law, in a case that is now the subject of ongoing proceedings. It is not properly within the jurisdiction of this Court and as such, the Petition must, respectfully, be denied.

CONCLUSION

Petitioner has failed to provide a jurisdictional basis or compelling reason for this Court to grant the Petition for Certiorari. Respondents, therefore, respectfully request that the Petition be denied.

Respectfully submitted,

BRUCE S. ROSEN
Counsel of Record
KATHLEEN A. HIRCE
McCUSKER, ANSELMI, ROSEN & CARVELLI, PC
210 Park Avenue, Suite 301
Florham Park, N.J. 07932
(973) 635-6300
brosen@marc-law.com

JENNIFER A. BORG
DINA L. SFORZA
NORTH JERSEY MEDIA GROUP INC.
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1 Garret Mountain Plaza
P.O. Box 471
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Attorneys for Respondents